Marion Rohr Corporation *and* Local 280, International Ladies Garment Workers' Union, AFL-CIO. Case 3-CA-9231

May 18, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 2, 1981, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party, herein called the Union, each filed reply briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge as modified herein, and to adopt his recommended Order, as modified.

The Administrative Law Judge properly found that during the period prior to the Union's demand for recognition on July 9, 1979,[2] Respondent Plant Manager Henry Schlossberg engaged in the following conduct in violation of Section 8(a)(1) of the Act:

After learning about the Union's organizing campaign, Schlossberg on April 27 created the impression of surveillance by telling Lyda Metcalf, an active union adherent, that he knew that she had been at the union meeting held on that day. Schlossberg also interrogated Metcalf concerning the union activities of other employees and the percentage of their membership in the Union. Schlossberg went on to warn her of the prospect of layoffs and a shutdown of the plant when he indicated, by citing the example of another employer, that there was a necessary linkage and causation between unionization and an employer thereafter going out of business.

At a meeting of all employees called by Schlossberg on the afternoon of April 27, he created a further impression of surveillance of the employees' union activities by telling them that the Union was around the plant forcing employees to sign authorization cards; that he knew of two employees who were soliciting signatures; that he also knew that there had been 12 employees at a union meeting; and that he had knowledge of the date of the next union meeting. Schlossberg also declared that, if the Union came in, he would no longer permit simultaneous vacations of the female employees with their husbands and would commence timing the employees' stay in the bathroom. Schlossberg then warned the employees that he could in the event of a strike close the doors of the plant and hire contractors to do the work.

Schlossberg again assembled his employees on April 30, at which time he repeated the warning that in the event of a strike he might have to close down the plant and subcontract out the work.[3] He also made the retaliatory statement that the Union could not prevent him from timing their bathroom visits. Schlossberg made the further statement to the employees that he knew who the five union sympathizers were, and warned that he could make things "hot and heavy" for them and could fire them if he wanted to.[4]

On May 2, Schlossberg told employees Debra Krajewski and Marie Trumbull that the girls who signed the cards would not be fired but that the card distributors would be fired eventually.

A few days later, Schlossberg held another employee meeting at which he repeated threats made at the two earlier meetings.[5] Following these meetings, seven employees took steps to revoke their authorization cards.

Schlossberg continued to engage in unlawful conduct subsequent to the Union's July 9 demand for recognition:

The Administrative Law Judge correctly found that Respondent violated Section 8(a)(3) and (1) of the Act on July 12 by "putting on notice," i.e., dis-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] All dates below refer to 1979 unless otherwise indicated.

[3] The Administrative Law Judge found, in connection with Schlossberg's earlier statement that he could close the doors, that the Union "had not suggested, much less threatened any type of strike." Accordingly, he properly found that this statement was, in the context of Respondent's other threats, an unlawful warning of a shutdown if the Union came in. In light of Schlossberg's April 30 warning, his earlier statement that he "could" close the doors takes on even more clearly the tone of a threat.

[4] In addition, the Administrative Law Judge held that Respondent threatened employees in violation of Sec. 8(a)(1) of the Act by telling them in April that, if the Union came in, (1) their workweek would be reduced because the Union's contracts prohibit the longer workweek and there would be layoffs caused by union-imposed rigid classifications of employment operations, (2) employees returning to work after pregnancy leave would on each such occasion be required by the Union to pay $35 in initiation fees, and (3) by telling employees on July 9 that the Union would prevent the hiring of 16- and 17-year-old employees. Contrary to the Administrative Law Judge, we find that the foregoing statements are not unlawful because they pertain to possible action by the Union rather than by Respondent.

[5] As the threats were repetitive and cumulative, the Administrative Law Judge deemed it unnecessary to make findings thereon.

ciplining, employee Carol Pawlica for her protected union solicitation before worktime, and discharging employee Lucinda Hurlburt in Pawlica's presence because she had a union card in her possession during nonworktime. Although Schlossberg apologized and rescinded the discharge, we find in agreement with the Administrative Law Judge that said repudiation of his unlawful conduct did not vitiate its coerciveness.

Finally, the Administrative Law Judge properly found that Schlossberg engaged in further unlawful conduct in violation of Section 8(a)(1) of the Act by telling Debra Axtell when she was hired in March 1980 as a temporary employee that she would be "very temporary" if he heard anything about her being involved with the Union.

We come now to the findings of the Administrative Law Judge regarding the allegation that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

The Administrative Law Judge found appropriate a unit which included production, maintenance, plant clerical, shipping, and receiving employees but excluded cutters, spreaders,[6] office clerical employees, and guards and supervisors as defined in the Act. We disagree with the exclusion of the cutters and spreaders by the Administrative Law Judge who found that they constituted a craft "in view of the lack of departmental integration [with] other cutting room employees who often perform tying, bundling, shipping, receiving, and driving."

The record shows that the cutters and spreaders and four packers and bundlers work in the cutting room, which is supervised by Leon Spicer, and adjoins the sewing room where 10 to 20 sewing machine operators do basic sewing on newly cut materials that are trucked in from the cutting room. In addition to their cutting duties, which require about a year's on-the-job training, the cutters spend from 50 to 90 percent of their time operating spreading machines, sorting bundles, preparing markers, driving, loading, and unloading of trucks.[7] The spreaders, who are trained for only 1 or 2 months, spend about 80 percent of their time operating spreading machines and devote their remaining time to making and preparing markers, bundling and tying of cut goods, and loading and unloading trucks.

It is clear from the foregoing that many of the duties of the cutters and spreaders are the same as those of the other cutting room employees all of whom are under the same supervisor. Accordingly, as they have interests in common with those of other unit employees and no other union seeks to represent them, we shall include the cutters and spreaders in the unit.[8]

As indicated above, William Spicer is one of the cutters excluded from the unit by the Administrative Law Judge. Although he found that William Spicer sporadically and irregularly assumed supervisory duties in the absence of his brother, Leon Spicer, an acknowledged supervisor within the meaning of the Act, the Administrative Law Judge nevertheless excluded him (William Spicer) as a statutory supervisor because of his "divided loyalty" stemming from his return to employee status among the employees he controls during his intermittent performance of supervisory duties. However, it is well established that an employee whose substitution for a supervisor is sporadic and limited cannot be deemed a statutory supervisor and is entitled to representation.[9] We therefore find that William Spicer is not a supervisor within the meaning of the Act.[10] Accordingly, we shall include him in the unit.

On July 9, the Union met with Plant Manager Henry Schlossberg and read a letter[11] to him requesting recognition. Schlossberg then ordered the union representatives to leave and, at a meeting called by him later that day, told the employees that he was sure that the Union did not have a majority and that he had written a letter to the Union rejecting its demand for recognition.[12]

The Administrative Law Judge found that on the morning of July 9, when the demand for recog-

[6] There were four spreaders and four cutters who were not sought by the Union or any other labor organization. As indicated below, one of the cutters, William Spicer, was also excluded on the alternative ground that he was a supervisor as defined by the Act.

[7] One of the cutters also sweeps the floor.

[8] The record shows that four of these eight employees submitted valid authorization cards.

Members Jenkins would adopt the Administrative Law Judge's finding that the cutters and spreaders are craft employees who may properly be excluded from the unit. Thus, his analysis of the Union's majority status follows that of the Administrative Law Judge.

[9] See *Canonsburg General Hospital Association*, 244 NLRB 899 (1979). See also *Statler Industries, Inc. (Statler Tissue Company)*, 244 NLRB 144 (1977), wherein the Board held that an employee who spends 50 percent or more of his time performing nonsupervisory duties cannot be denied the advantages of collective bargaining.

[10] Contrary to the Administrative Law Judge, who relied on *Westinghouse Electric Corporation*, 163 NLRB 723, 727 (1967), in excluding William Spicer from the unit as a supervisor, the Board in that case permitted employees to be included in the bargaining unit where, as here, their supervisory duties were not regularly or closely intermingled with their nonsupervisory work.

[11] The letter was not introduced at the hearing which was closed on December 4, 1980. However, the General Counsel on February 20, 1981, sent the Administrative Law Judge as a proposed exhibit a copy of the purported letter wherein the Union "demands recognition" and states, "This is a continuing demand." Upon a motion by Respondent, the Administrative Law Judge rejected the proffered document on the ground that no such letter was offered in evidence and there was no sufficient preliminary foundation laid which would identify it as the actual demand letter that Schlossberg read before refusing the Union's demand for recognition.

[12] Respondent's letter, dated July 9, 1979, which was received in evidence, refers to the Union's "letter of July 9, 1979, requesting recognition" but contains no further description thereof.

nition was made, the Union had not then achieved majority status because it had 96 valid cards[13] for a 200-employee unit which excluded the cutters and spreaders. We agree with that conclusion as the inclusion of the cutters and spreaders in the unit resulted in 100 valid cards for 208 employees and hence fell short of a majority. We therefore find in agreement with the Administrative Law Judge that as of July 9 Respondent's refusal to bargain with the Union was not unlawful.

However, the Administrative Law Judge found that the Union did achieve majority status on July 10 by virtue of 100 valid cards out of 197 employees in a unit which excluded cutters and spreaders. We agree with that conclusion as the modified unit, which includes them, resulted in 104[14] rather than 100 valid cards for a unit of 205 rather than 197 employees. Despite the Union's majority status on July 10, the Administrative Law Judge properly held that there was no basis in the record to show that the Union's demand on the preceding day might be characterized as a "continuing demand," and no exception was taken to this finding. Yet the Administrative Law Judge held, and we agree, that the Union was nevertheless entitled to a bargaining order to remedy effectively Respondent's unlawful conduct.[15] Thus, Schlossberg as plant manager and highest level supervisor was in a position to have a heavy impact on the employees when he made a series of coercive and intimidatory statements and threats of loss of benefits, discharges, layoffs, and shutdown of the plant which were designed to impress upon them the unwelcome prospect that their support of the Union would endanger their continued employment with Respondent. It is clear that Schlossberg's serious and persistent threats, particularly those pertaining to a punitive shutdown of the plant and loss of employment, would have effects which are unlikely to be eradicated by our usual cease-and-desist order.[16] In this connection, we agree with the Administrative Law Judge that three additional factors ultimately demonstrate the lingering effects of the foregoing coercive conduct and the indispensible need for a bargaining order: (1) the withdrawal of no less than seven authorization cards following Schlossberg's speeches, (2) the July 12 discharge of Hurlburt, and (3) the discharge threat made to Axtell in March 1980. Accordingly, we shall in agreement with the Administrative Law Judge order Respondent, upon request, to bargain retroactively with the Union regarding wages, hours, and conditions of employment as of July 10, 1979.[17]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Marion Rohr Corporation, Hornell, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for the unit description contained in paragraph 2(a):

> "All production and maintenance employees, plant clerical employees, shipping and receiving employees, cutters, and spreaders employed by Marion Rohr Corporation at its facilities located at 18 North Main Street and at Edison Street in Hornell, New York, but excluding office clerical employees, and guards and supervisors within the meaning of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

[13] The Administrative Law Judge discredited the testimony of employee Leah Dawson that several cards including hers were executed on the solicitor's assertion that there would be an election. As indicated above, we found no basis for reversing any of the Administrative Law Judge's credibility resolutions. However, the Administrative Law Judge also stated that Respondent abandoned its position that the cards were solicited for the purpose of securing an election. Because it appears that Respondent did adhere to that position which it expressed in its brief to the Administrative Law Judge, we disavow his finding to the contrary.

[14] As indicated above, four of the eight cutters and spreaders submitted valid cards.

[15] In this connection, the Administrative Law Judge properly deemed without merit Respondent's contention that a bargaining order was not warranted because of employee turnover and the passage of time since July 1979. In view of that holding of the Administrative Law Judge, we find it unnecessary to adopt his further statement that in any event those issues will be resolved by the Board if and when it enforces the recommended Order and Respondent fails to comply therewith.

Member Zimmerman would not order Respondent to bargain with the Union since he finds the unfair labor practices found by the Board not to be of sufficient magnitude as to preclude a fair election following application of the Board's traditional remedies. He therefore finds it unnecessary to pass on the question of whether the Union ever obtained majority status or on Respondent's contention that a bargaining order was not warranted because of employee turnover and the passage of time since the occurrence of the unfair labor practices.

[16] See *Ed Chandler Ford, Inc.*, 254 NLRB 851 (1980). Cf. *N.L.R.B.* v. *Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980), wherein the court held a bargaining order was unjustified in the absence of serious "hallmark" violations. We find in agreement with the Administrative Law Judge that *Jamaica Towing* is distinguisable from the instant case which does involve "hallmark" violations.

[17] As the bargaining order must be retroactive under existing Board law, Member Fanning abides thereby despite his position in *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977), that bargaining orders should be dated prospectively in the absence of a continuing demand by the Union.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge, place on notice, or otherwise discriminate against our employees because they engage in union activities or because they engage in protected, concerted activities.

WE WILL NOT give the impression of surveillance of our employees' union activities or their union meetings or coercively interrogate them.

WE WILL NOT threaten reprisals against our employees because they engage in union activities or because they select Local 280, International Ladies' Garment Workers Union, AFL-CIO, or any other labor organization, as their collective-bargaining agent.

WE WILL NOT in any other manner interfere with our employees' exercise of their rights guaranteed them in Section 7 of the National Labor Relations Act as amended.

WE WILL expunge from our records any reference to discipline accorded to Carol Pawlica and Lucinda Hurlburt on July 12, 1979.

WE WILL, upon request, recognize and bargain collectively in good faith with Local 280, International Ladies' Garment Workers' Union, AFL-CIO, in the bargaining unit described below with respect to rates of pay, wages, hours of work, and other terms and conditions of employment as of July 10, 1979, and WE WILL, upon request, embody in a signed agreement, any understanding that may be reached. The bargaining unit is:

> All production and maintenance employees, plant clerical employees, shipping and receiving employees, cutters, and spreaders employed by the Employer at its facilities located at 18 North Main Street and at Edison Street in Hornell, New York, but excluding office clerical employees, and guards and supervisors within the meaning of the Act.

MARION ROHR CORPORATION

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: Upon a charge filed and served on July 24, 1979, by Local 280, International Ladies' Garment Workers Union, AFL-CIO (herein called the Union), upon Marion Rohr Corporation (herein called Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued an amended complaint and notice of hearing on August 14, 1980, to which Respondent duly filed its answer. The amended complaint, thereafter further amended at the hearing, alleges that Respondent engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act as amended, herein called the Act.

Pursuant to prior notice, the hearing was held in Hornell, New York, on December 2, 3, and 4, 1980, at which all parties were represented by counsel and accorded the right to call, examine, and cross-examine witnesses, produce evidence, and argue on the record. After the receipt of the evidence, the parties waived oral argument and thereafter submitted posthearing briefs which have been carefully considered.[1]

Upon the entire record, including the briefs, and from my observation of the demeanor of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New York corporation, maintaining its principal office and place of business at 18 North Main Street, Hornell, New York, and a factory and place of business at Edison Street, Hornell, New York, has at all times material herein been engaged at said locations in the manufacture, sale, and distribution of ladies' underwear and related products. Respondent, annually, in the course and conduct of its business operations, from facilities located at the above addresses, manufactures, sells, and distributes goods and products valued in excess of $50,000 of which products valued in excess of $50,000 were and are shipped directly to States of the United States other than the State of New York. Respondent admits, and I find, that it is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admitted during the hearing, and I find that Local 280, International Ladies' Garment Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issues Involved*

At issue in this case is whether Respondent, principally in the period April through July 1979, and again in March 1980, violated Section 8(a)(1) of the Act by, *inter alia*, creating the impression of surveillance, and by various threats of reprisal relating to its employees engaging in union activities; whether Respondent violated Section

[1] The three carefully crafted briefs merit special mention as thorough and persuasive.

8(a)(3) and (1) of the Act by discriminatory conduct, including discharge, of its employees Lucinda Hulbert and Carol Pawlica; and whether Respondent, on and after July 9, 1979, violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as the majority representative of Respondent's employees in an appropriate unit. In this regard, Respondent denies not only the Union's majority status in any appropriate unit but denies both the appropriateness of the unit alleged in the complaint and the exclusion of certain employees therefrom. Finally, Respondent argues that, even if Respondent would otherwise be obliged to recognize and bargain with the Union, no such obligation should be found due to both the large turnover of employees it has experienced and the great passage of time since the summer of 1979. It asserts that the proper remedy should be an election rather than an order directing it to recognize and bargain.

B. *Background: The Organizational Campaign*

Respondent maintains two manufacturing plants in Hornell, New York. About 3 years ago, it maintained only one plant, the Main Street plant, but thereafter opened the second plant on Edison Street which is about 1 mile away from the Main Street plant. The Edison Street plant consists of at least two floors: the bottom floor for shipping-receiving; the top floor divided into at least two areas, the cutting room which employed about a dozen employees and a sewing room employing between 10 and 20 (predominately female) sewing machine operators. There are approximately two shipping and receiving department employees in the Edison Street plant with an overall shipping and receiving department numbering about 10 employees in both plants. After receipt, the flow of goods in Respondent's operation starts the cutting room and thereafter to sewing and bundling operations in the Edison sewing room abutting the cutting room and thereafter to other sewing, bundling, packing, and shipping operations in the Main Street plant.

It is uncontested that the Respondent employed office clericals and supervisors in the several departments: Henry Schlossberg the plant manager over both plants; Leon Spicer, supervisor in the cutting room as well as over the entire Edison Street operation; Bill Kelleher, in the shipping and receiving department; and Aletha Cardman in the sewing machine room at the Main Street plant, are all supervisors within the meaning of Section 2(11) of the Act and Respondent's agents. The supervisory status of sometime supervisory cutter William Spicer and of Doni Binder, employed in the sewing machine operators' room at the Edison Street plant, abutting the cutting room, is in issue.

The Union started an organizing drive among Respondent's production and maintenance employees in late March 1979. Its agents included Myrtle Elliott, Betty Ponticello Haley, Bob McManus, and John Serio. They distributed to the production employees, commencing on or about March 22, 1979, union authorization cards bearing the following matter on the face thereof:

Authorization Card

> I, of my own free will, hereby authorize the INTERNATIONAL LADIES' GARMENT WORKERS UNION, its affiliates and its representatives, to act exclusively as my agent and representative for the purpose of collective bargaining.

Beneath that paragraph, there are separate lines for the printed name of the employer-signer, the address of said employee, the employer by whom employed, the employer's address, the employee's signature, and the date. Nothing on the card relates to an election.

The Union held about 12 meetings of employees at various places in and about Hornell, New York, including the Candlelight Motel, the American Legion Hall and other similar places. Four of these union meetings were held prior to July 9, 1979, which was the date, Respondent admits, the Union made a demand for recognition and bargaining upon Respondent. Respondent by letter of July 9 refused to recognize the Union at that (or any other time) and directed the Union's attention to the Board's processes (Resp. Exh. 2). In particular, there was a meeting of employees with the Union at the Coachlight Motel on April 24, 1979, which meeting was conducted by Union Agents Serio, Betty Ponticello Haley (hereinafter called Ponticello), and Myrtle Elliott. The April 24 union meeting, according to Henry Schlossberg, was attended by 10 to 12 employees, 5 of whom he believed to be particularly active union supporters, helping the union organizers. He testified that he received this knowledge from employee Mary Ann Ciancaglini who voluntarily reported to him of the participants in this union meeting. With a few days of the meeting, she told him the names of the five chief union supporters among Respondent's employees: Tracey Clarke, Anita Gordon, Lyda Metcalf, Ms. Sanford, and Carol Pawlica. As noted below, Schlossberg knew that Lyda Metcalf was a strong union supporter by noon of Friday, April 27. Whether Ciancaglini was the source of this information is unclear. In any event Schlossberg thereafter noted, without naming, the five chief supporters in one or more speeches to his employees. In July, he took unlawful action against Pawlica.

1. The events of April 27 and shortly thereafter

As above noted, on Tuesday, April 24, 1979, at the Coachlight Motel in Hornell, New York, the Union held a meeting of about a dozen employees including the above, five apparently strong union sympathizers, Lea Dawson and Mary Ann Ciancaglini. Lea Dawson signed a union card at that meeting. Three days later, on Friday, April 27, at 12:30 p.m., while Lyda Metcalf, employed by Respondent for more than 7 years as a sewing machine operator, was receiving her pay, she was told by an office clerical to go to Schlossberg's office. When she entered, Schlossberg closed the door. Schlossberg said the meeting lasted 15–20 minutes but he could not recall what she said. I do not believe such testimony. Rather, as Metcalf testified, he told her that he knew she had been at the union meeting; that she was the sixth employee called in; that she would not be fired; that she

need not worry;[2] that she had been around the plant for sometime, and was familiar with unions because she had worked for an employer which had a union. He mentioned an employer, Corbin Manufacturing Co., of Hornell, New York, which had a union and went out of business, with all the employees who had paid into its retirement fund never receiving any money. In context, such a statement demonstrating the necessary linkage between an employer going out of business because of unionization and loss of retirement benefits violates Section 8(a)(1). So far as is known, loss of benefits through insolvency is not the inexorable consequence of unionization. *Centre Engineering, Inc.*, 253 NLRB 419 (1980). He told her that, if they got a union into the plant, the work could not be "fluctuated" (i.e., flexibly assigned) among the employees and that some employees would have to be sent home because of the lack of ability to "fluctuate" the work.

He asked her what "went on" at the union meeting and who else was there. Metcalf answered that it was clear that he knew what went on at the meeting and told him that she would not "rat on" the other employees. When Schlossberg asked if the union meeting concerned pensions and vacations, Metcalf said that it did but that no specifics were discussed on these matters. Schlossberg then asked if the union meeting concerned getting higher pay, and Metcalf said that it did not. He then asked what percentage of the employees belonged to the Union, and Metcalf said that she did not know.

I conclude that, as alleged, Schlossberg, on April 27, 1979, created an unlawful impression of surveillance by telling her he knew she had been at the union meeting; and also, in view of Metcalf's further testimony, unlawfully interrogated her concerning the union activities of other employees and the percentage of membership; and unlawfully warned her of layoffs due to unionization. Respondent thus further violated Section 8(a)(1) of the Act.

At 3 p.m., on April 27, all the employees of both plants were called into a meeting at the Main Street plant and were addressed by Henry Schlossberg. I conclude that Schlossberg called this employee meeting in response to the information he had received from interrogating Metcalf and others. As he described it, it was a lecture on the matter of the Union's organization effort accompanied by questions, solicited from the audience, which he answered. The following facts are found on the basis of testimony of employees Tracey Clarke and Lyda Metcalf, and Henry Schlossberg. Clarke and Metcalf testified as current employees of Respondent.

Schlossberg told them that the union was around the plant forcing employees to sign authorization cards; that he knew of two solicitors among the employees who were going around getting the signatures; that there had been 12 girls at a union meeting and that he knew when the next union meeting would be. I find and conclude, as alleged in the complaint, that this statement, in violation of Section 8(a)(1), constituted Schlossberg's creation of a further unlawful impression of surveillance of employees' union activities. He also told the assembled employees that, if the union came in, Respondent would no longer be able to hire handicapped employees and pregnant women essentially because these employees, under union working conditions, would be unable to produce sufficient product to make the union piece rate; and that he kept them in employment notwithstanding their deficiency as producers because he found them to be steady and reliable. He cited no union rule or contract to that effect. His statement is a threat of layoff in violation of Section 8(a)(1). He also said that, if the union came in, he would no longer permit simultaneous vacations of predominately female employees with their husbands; and, if employees went off on pregnancy leave for several months, they would be rehired as new employees under Respondent's existing rules, but would be required to pay $35 in union initiation fees on each such occasion. No union rule to that effect was cited. His statement was retaliatory and violated Section 8(a)(1) of the Act. He also told them that, if the Union came in, their workweek would be reduced from 40 hours to 37-1/2 hours because the union contracts prohibit a longer workweek; that he would no longer tolerate their spending long periods of time talking to each other in the bathroom but he would be able to put into the bathroom someone to time their breaktimes in the bathrooms; that, if the Union came in, they would not have any choice of whether to work overtime or not; that if Respondent became unionized he would, after 23 or 24 years of not laying off employees, be forced to have layoffs due basically to the rigid classification of work operations required under union contracts, and specifically because of the flow of work in an underwear factory where, if one group or section of employees was without work, it would have to be sent home because of a lack of flexibility in assigning them other tasks. This is the same message he conveyed to Lyda Metcalf earlier the same day.

There is no assertion that the Union made any demands on Respondent or suggested any work rules. Nor did Schlossberg show that the results as were required by any and all International Ladies' Garment Workers Union agreements.[3]

I conclude that his assertions in his speech of April 27, 1979, that the unionization of Respondent would prevent continued employment of pregnant women, would cause layoff among employees, changes in the leave policy by

[2] Henry Schlossberg testified that when he learned of the union organizing effort in late March, he proceeded to obtain literature relating to union organization drives, including a list of "do's and don'ts," the constitution of the union, union contracts, and various publications relating to unions. He received all of these documents in or about the first week of April before his meetings, above, with employees. He testified generally, in addition, that when various employees told him of their attendance at union meeting and the proceedings thereat, he told these employees that he was "not interested" and never asked them questions relating to what occurred at the union meetings. Since his recollection of the above 15-minute closed-door session with Metcalf was admittedly unreliable ("she may have made comments,") or selective, and since it was he who initiated the conversation I do not credit this testimony. I credit Metcalf.

[3] Although Schlossberg, in his several speeches to employees, adverted to requirements of union contracts, no contract was ever offered in evidence to support his claims. When, at the hearing, as noted in the text, he was specifically directed to the terms of an International Ladies' Garment Workers Union agreement he used in his speech (which he said, in his April 30 speech, would cause a diminution of vacation benefits if the Union came in), he admitted he was confused and mistaken.

not permitting husband-wife vacations, a diminution of the workweek and layoffs caused by union-imposed rigid classifications as well as the timing of employees in the bathrooms, all as alleged in the complaint, constitute violations of Section 8(a)(1) of the Act. Anita Gordon, another credible witness called by the General Counsel, recalled, in addition, that Schlossberg told them that in event of a strike, Respondent could close the doors of the plant and hire contractors to do the job cheaper and faster. Schlossberg's version of this element, in substance, was that in the event of a union strike, he could lawfully complete unfinished work by subcontracting out such work. The Union had not suggested, much less threatened, any type of strike. Such a statement was merely intimidation and a warning of a shutdown in which the employees would not be paid but Respondent would suffer no ill effects. In short, the futility of unionization. Such a statement in this context of other threats, violates Section 8(a)(1). See for instance, *Centre Engineering, Inc., supra.*

2. Schlossberg's speech of April 30, 1979

At the end of this Friday, April 27, 1979, speech he told them that there would be another speech to the employees of both plants in the Main Street plant on the following Monday, April 30. He requested the employees to assemble questions relating to the advantages and drawbacks of unionization.

The April 30, 1979, speech, according to Schlossberg, had less lecture in it and more questions and answers. Anita Gordon said, and I find, that it was pretty much a repeat of the April 27 speech. The following findings are based primarily on the credited testimony of Anita Gordon, Tracey Clarke, and Lyda Metcalf along with two transcriptions. (G.C. Exhs. 8 and 11.) The April 30 speech was tape recorded by Tracey Clarke. However, the tape recording,[4] which was heard by counsel for all parties and, with their consent, by me, has been transcribed by two persons. The first transcription (G.C. Exh. 8) was made by Ponticello, the union agent; the second (G.C. Exh. 11), by the court reporter[5] on the consent of all parties. Both transcriptions and the tape are in evidence. Upon review of the tape, and both transcriptions, and having reviewed the testimony of Tracey Clarke, Anita Gordon, Lyda Metcalf, and Henry Schlossberg, I find that the matters spoken of at the April 30 meeting can be reasonably set down and any conflicting versions resolved. I conclude that at the April 30, 1979, meeting, as at the April 27 meeting, Schlossberg told the employees that, if the Union got in, he could not continue in employment of the handicapped and pregnant employees because they would not be able to make the production rates in the union contracts. He also told them, at length, that they would receive reduced vacation benefits because, while the Union paid vacation pay based on straight earnings, Respondent had heretofore a policy of paying vacation benefits based on 2 percent of the employees' gross earnings of the prior year. At the hearing, Schlossberg, confronted with the sources from which he made these assertions regarding the payment of lesser vacation benefits under the Union (based merely on straight time), admitted that he was confused by the International Ladies' Garment Workers Union contract provisions regarding holiday pay rather than vacation pay. He also told the employees that, in the event of a strike, he would attempt to continue to fill orders but thereafter might have to close down the plant and continue filing orders by means of subcontracting out the work. It was also clear that at the April 30 meeting, he again asserted that unionization would bring rigid classification of employment operations which would lead to layoffs of employees in the event of a halt in production by one of the production segments in the rigidly classified unionized plant. I conclude that he was again telling them that unionization necessarily requires such rigidity of job classifications as to lead inexorably to layoffs in a ladies underwear plant. While it is arguable that the collective-bargaining agreements which Schlossberg allegedly read did relate to classification of operations of employees, there was nothing in such documents which lead to the conclusion that layoffs would be required whether or not there was an interruption of production, nor to the issue of job or classification interchange. That was Schlossberg's conclusion. There was nothing automatic shown to exist *in the contracts* relating to layoffs. I conclude that, as in the April 27 speech, he was threatening retaliation, futility and reprisal for unionization to these employees in violation of Section 8(a)(1) of the Act.[6] Similarly, the tape showed, contrary to some of the employees' testimony regarding the April 27 and 30 speeches, that Schlossberg said that the Union could not prevent *him* from putting a person in the women's bathroom to time their stays therein. This retaliation, based on a union coming into the plant, similarly violated Section 8(a)(1) of the Act. The transcripts and the tape also

[4] Respondent objected to receipt of the tape on the ground that there was insufficient foundation demonstrating a chain of custody. The record, however, particularly the testimony of Betty Haley, shows to the contrary. Moreover, Respondent failed to suggest, much less to prove, any tampering with the tape. *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Lodge 587 (Stone & Webster Engineering Corporation)*, 233 NLRB 612, 615, fn. 10 (1977).

[5] Although some portions of the tape are unintelligible, much of it is understandable. Receipt or rejection of the tape, however, would not affect Schlossberg's other speeches. Subsequent to the close of the hearing, Respondent moved to correct the court reporter's transcript so as to show numerous instances where employees' laughter met Schlossberg's April 30 speech, and the questions and answers. (ALJ Exh. 3.) I grant Respondent's motion regarding the 19 instances of laughter but deny her further request to have the court reporter correct the transcript of the speech for further instances of laughter. I have listened to the tape. The tone, level, and nature of laughter is uneven: some flows from Schlossberg's clowning; some spontaneous. Laughter in the midst of a speech relating to the close down of the plants, strikes, loss of work, and discharge of union proponents is legally rather grim humor. I conclude, as the General Counsel suggests, that any such laughter is here irrelevant. If the Board, *Quemetco, Inc.*, 223 NLRB 470 (1976), and courts, *N.L.R.B. v. Laredo Coca-Cola*, 613 F.2d 1338 (5th Cir. 1980), often find "friendly" interrogation to be coercive, then humorous threats, in the presence of other unfair labor practices, cannot be ignored under Sec. 8(a)(1). Cf. *El Rancho Market*, 235 NLRB 468, 471 (1978).

[6] Thus (G.C. Exh. 11, p. 4), he said: "Now, this [layoffs due to interruptions in work flow due to rigid classifications] in what I meant when I said there would be the probability of the considerable amount of layoffs, in other words, not being almost guaranteed the 52 weeks." Again (p. 21), "If you were unionized today, the picquot girls would not be working tomorrow, the top elastic girls would not be working tomorrow"

showed that Schlossberg told the employees that he was not describing what he was going to do in the event that the Union got in but was merely telling them what benefits they would lose "if this factory becomes union." (G.C. Exh. 11, p. 30.) No clearer statement of retaliation could be made than by telling the employees that they would lose various advantages of being employed under nonunion standards by the advent of the Union. There was nothing to show that these losses were matters outside his control. This generalized statement of inexorable loss is a violation of Section 8(a)(1) of the Act. Similarly, there nothing in of the union contracts wherein unionization would require Respondent not to offer employment to hand employees. By so stating, Respondent offered another type of retaliation against any handicapped employees and indeed all employees in his plant to refrain from unionization.

In the April 30 meeting, he told employees that he knew who the five union sympathizers were among the production and maintenance employees and that the only reason he was not firing them for such activity (wanting a clean place to eat other than at worktables and better ventilation, G.C. Exh. 11, p. 23) was because he felt that they had been mislead and had gone "overboard" for the Union. Such a statement violates Section 8(a)(1) of the Act. He also said that if he desired, since he knew who they were, he could have them identified during the meeting and make things "hot and heavy" for them because they were "in absolute violation of all Federal Standards . . ." (G.C. Exh. 11, p. 38). Such statements additionally violate Section 8(a)(1) of the Act. On the witness stand, quite apart from the tape or the testimony of the General Counsel's witness, Schlossberg admitted that he told the employees that (1) he knew who the five union supporters were, (2) could make things hot and heavy for them and (3) could fire them if he wanted to. Such admissions support the accuracy of both tape transcriptions, and the testimony of General Counsel's witnesses.

3. The events of May 2, 1979

Debra Baird Krajewski testified that sometime after the April 30 meeting, she and employee Marie Trumbull, encountered Schlossberg on a stairway near the entrance door of the Main Street plant after lunch. They said they wanted to ask him questions relating to the Union, particularly the wisdom of their having signed union cards. Their action apparently flowed from Schlossberg having told the employees, at the April 30 meeting, the signing of union cards in themselves was meaningless but that if the majority signed cards, the Union would come to Respondent and demand recognition. Schlossberg told them that the girls who signed cards would not be fired but that the card distributors would be fired eventually and that he would find out their names from the Union. She said that he also asked what the Union had to offer them in terms of pay and insurance. Schlossberg told them that there has never been a layoff in Respondent since it had started in business and that there would be layoffs and cuts in hours and pay if the Union came in. Although Schlossberg admits having met with Krajewski and Trumbull, he at first could not recall what happened at the meeting but thereafter testified that they asked him what would be the benefits if the plant was unionized and if they joined the Union. Schlossberg said that he told them only that it was his opinion that joining the Union and unionization would gain them nothing. He denied saying that he would find out who joined the Union and fire them. I do not credit Schlossberg and credit Krajewski's version. Such statements by Schlossberg that he would discover from the Union who were the card distributors and fire them is consistent with his having previously threatened to fire the five, known union sympathizers and violates Section 8(a)(1) of the Act.

4. The events of May 8, 1979

The complaint alleges that at the Main Street plant, on May 8, 1979, Schlossberg told the employees that (1) he did not have to negotiate with the Union; (2) it would be futile for them to select the Union as their collective-bargaining representative, (3) they would be discharged, and (4) Respondent would cease its operations and withhold employment for summer applicants if employees selected the Union as their collective-bargaining representative. The uncontradicted and credited testimony of Lyda Metcalf is that, about a week after the April 30 meeting, there was a third meeting of employees with Schlossberg. She testified without contradiction that Schlossberg said he did not have to negotiate with the Union on what he did not want to; (she apparently confuses this with the April 30 meeting) he could make them eat in the parking lot and the Union could not challenge it; they could be fired for excessive absenteeism or not making rate; and, although he would not fire them for signing a union card, if the Union came in, layoffs would result because of the lack of "fluctuation" (i.e., flexibility) in production operations. I conclude that Lyda Metcalf's testimony with regard to the May 8 meeting was, although undenied, repetitious of the April 30 meeting. While these events may have occurred, it is unnecessary to make findings thereon. They are merely cumulative and repetitive of threats and other elements of retaliation he made in his April 27 and 30 speeches.

5. The events of July 9, 1979

At or about 6:45 a.m. on the morning of July 9, four union agents (Serio, Simonetti, Ponticello, and Elliott), together with employees Tracey Clarke and Anita Gordon, entered Respondent's office and spoke with Schlossberg. July 9 was the first day of work or the employees after a 2-week vacation beginning in the last week of June 1979.

When Schlossberg identified himself, Ponticello began to read a letter requesting recognition, but Elliott finished reading it. Schlossberg asked them if they were finished and, when they told him that they were, Schlossberg told them to get out of the office; and that his employees could do "what they want." They all left. A couple of days later, they returned and spoke with Schlossberg. Serio asked Schlossberg if Clarke and Gordon could return to their jobs and Schlossberg told them that they could. Indeed Schlossberg asked the

union official why they had returned to his office and Serio told him that just wanted to make sure that the employees had their jobs.

Later on in that day (July 9), Respondent called a meeting at the Main Street plant of all employees.[7] Schlossberg told the employees that he was sure that the Union had no majority in view of the fact that many employees were asking for their cards back. He told the employees that he did not feel that they needed a union; that a union would just pull them all down; that the Union, had along with two of the female employees wearing big green union buttons, had demanded recognition, and he told them to leave the premises. He said at the meeting that he had not fired anybody and was not going to fire anybody; he had written the Union a letter of rejection to their demand of recognition; and it was mostly the younger girls who were involved with the Union and that they did not know how good it was without the Union. He again repeated that they might be terminated if the Union came in because of excessive absenteeism and not working up to rate. He also told them that, if the union came in, he would not be able to hire the same summer help that he had been previously hiring at age 16 and 17 because the union contract required employees to be 18 years of age. No contract to that effect was offered in evidence to show hiring or firing based on age or production.

Schlossberg, on July 9, by telling the employees that unionization would prevent hiring 16 and 17 years olds without proof thereof in a union contract, and repeating to the employees that they could be discharged for excessive absenteeism and not making rate if the Union came in, violated Section 8(a)(1) of the Act. To the extent that the complaint alleges further violations of Section 8(a)(1) of the Act on July 9, I find that such allegations were not supported by proof and should be dismissed.

C. *Violations of Section 8(a)(3) on July 12, 1979*

1. Carol Pawlica, like Lyda Metcalf, Tracey Clarke (but not Anita Gordon), and other employees called by the General Counsel as witnesses, was employed by Respondent at the time of her testimony and therefore considerable weight has been given this factor in assessing her credibility. *Georgia Rug Mill Co.*, 131 NLRB 1304 (1961). Schlossberg's version, where not consistent with Pawlica and Hurlburt, is not credited.

Pawlica, employed since May 1971, testified that she had signed her own membership card for the Union on March 28, 1979. Thereafter, Tracey Clarke give her a blank card and asked her to solicit some other employee to sign a card for the Union.

On the morning of July 12, 1979, she was in the plant around 6:45 a.m., along with other employees, and had noted that employee Hurlburt was then showing other employees pictures of her children. Worktime begins at 7 a.m. Pawlica testified that Hurlburt had asked her for a card prior to this time but Hurlburt denies that. For reasons discussed below, I do not credit Hurlburt and find that Hurlburt had asked Pawlica for a union card. Pawlica voluntarily slipped a blank union card into Hurlburt's picture envelope which Hurlburt returned to her handbag together with the pictures of her children. This was about 6:45 a.m., 15 minutes before starting time.

In any event, more than an hour and a half later, about 8:45 a.m., Supervisor Aletha Cardman told Pawlica to go into the office where Schlossberg wanted to see her. When Pawlica entered the office, Hurlburt was already there and Schlossberg asked Pawlica whether she had given the union card to Hurlburt 15 minutes ago. Pawlica denied that she had done so and asked Hurlburt if she had told Schlossberg that she had given the card to her only a few minutes ago. Hurlburt denied having said so but Schlossberg told her that he was not asking Hurlburt the question but was asking Pawlica.[8] Pawlica said nothing and Schlossberg told Hurlburt to punch out and go home. Hurlburt left. Schlossberg then turned to Pawlica and said that "as of now, I'm putting you on notice." He then told her to go back to work and she did. Thereafter, 1 week later, she asked Schlossberg what it meant to be "put on notice." She was at that time with Tracey Clarke and Lyda Metcalf. Schlossberg told her that it was a private matter and to come into the office. When she did so, he told her that it meant that she was misusing company privileges, the privilege of "talking." No company rule relating to talking among employees prior to or at work was ever suggested in the evidence. I conclude that, as alleged in the complaint, Schlossberg, on July 12, 1979, by telling Pawlica that she had been placed "on notice" for her conduct earlier that day, was an act of discriminatory discipline and thus violated Section 8(a)(3) and (1) of the Act. The sole Pawlica conduct mentioned by Schlossberg was the giving of the card prior to commencement of worktime. Such union solicitation is presumptively lawful. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962). It is relevant that at no time during the hearing did Respondent suggest a benign meaning to "on notice." It was obviously an act of discriminatory retaliation concerning Pawlica's union solicitation conduct. No evidence to rebut the presumption was offered.

2. Lucinda Hurlburt testified that she had, on several occasions, left the Company's employ after 1973 for purposes of maternity leave. On July 10, 1979, in Respondent's office, she asked Schlossberg for reemployment and Schlossberg asked her if she knew that the Union was around. She told him that she did. He then told her that although he did not have to rehire her as an employee (because she had quit three times) he would employ her. He told her to report the next day and she did.

[7] In the April 30 speech (G.C. Exh. 11, p. 20), Schlossberg said that employees' signing union cards was "meaningless at this point," but "meaningful . . . if they get enough cards." Thus, on July 9, Schlossberg evidently no longer considered the signing of cards to be "meaningless." As will be discussed hereafter, it was only after this July 9 request that Schlossberg committed violations of Sec. 8(a)(3) and (1) of the Act; i.e., on July 12, 1979.

[8] This may have been Schlossberg's attempt to cause Pawlica to erroneously admit to having solicited the signature during working time in a working place, a possible predicate for disciplining her for such an act. Hurlburt directly denied Schlossberg's suggestion as did Pawlica. In fact, Schlossberg asked to see Hurlburt's pictures and he found the union card among the pictures.

On July 12, as Pawlica testified, Hurlburt was showing pictures to her coemployees about 6:45 a.m. Schlossberg came to her workbench around 8:45 a.m. and asked if Pawlica gave her a union card. She answered: "Not that I know of." Schlossberg told her it was "illegal" if Pawlica had done so. She was thereafter called into the office. Alone in the office, Schlossberg asked to see the pictures in her bag and took out the union card which, according to Hurlburt, was a complete surprise. While the matter is not free from doubt, I do not credit Hurlburt's testimony that she was caught by complete surprise by inclusion of the card among her photographs and I find, as above noted, crediting Pawlica, that she had asked for the card.[9] I conclude that her testimony (that she was caught by surprise) was caused by the fact that she was then a newly hired employee and was frightened of Schlossberg. At any rate, at this time, around 8:45 a.m., Schlossberg removed the card and called in Pawlica. He asked Pawlica if Pawlica had put the card in among Hurlburt's pictures and Pawlica said that she had done so. It was at this point Schlossberg told Hurlburt to punch out and go home. She did so and Schlossberg continued his conversation with Pawlica, above.

About an hour after Hurlburt went home, Schlossberg sent a male employee after her. There was no phone in her house. Notwithstanding that the employee told her that Schlossberg wanted her to come back so he could talk to her, she did not return but went to the unemployment office where she was soon found by supervisor Aletha Cardman (sent by Schlossberg) who told her that Schlossberg "didn't want the union in" but wanted to talk to her. About 10:50 a.m., she returned to the plant and spoke to Schlossberg. Schlossberg said that he did not apologize to many people but was going to apologize to her for what he did to her. He told her that she could come back to work and she agreed. He also told her, in response to her question, that if she signed a union card he would not do anything against her because "there is nothing [I] could do" about it. He told her that he would pay for the whole day and asked her to return to work. She did not do so because she felt ill and returned to work the next day. Hurlburt was not cross-examined on the merits of her testimony and Schlossberg did not deny it. The uncontested evidence therefore shows that Schlossberg terminated her because she had a union card placed in her possession on nonwork time. She violated no Respondent rule. It was a retaliatory and unlawful discharge which violated Section 8(a)(3) and (1) of the Act as alleged in the complaint.[10]

[9] Since Hurlburt was not employed by Respondent at the time of the hearing, there would be no pressure against her admitting that she had asked for the card. As I observed Hurlburt, however, I conclude she would be adverse to admitting the contrary story when she had told Schlossberg that the card was a surprise. Certainly she admitted that Pawlica previously had asked her to sign a union card the day before and Hurlburt agreed. Thus the card and the donor were hardly a complete surprise, although suddenly finding it among her pictures may have been a surprise.

[10] Schlossberg's apology and payment to Hurlburt does not appear to constitute such a repudiation of his unlawful conduct as to vitiate its coerciveness or unlawfulness. He neither notified Pawlica (who witnessed the discharge) of his apology and statement to Hurlburt nor, even after Pawlica's inquiry to him regarding his discriminatory acts against *her*, apologized to Pawlica; nor did he notify plant employees (of his apology) who presumptively knew of these unlawful acts committed by their chief supervisor. Compare: *General Stencils, Inc.*, 195 NLRB 1109, 1112 (1972). (Chairman Miller, dissenting), and *Bausch & Lomb Optical Co.* v. *N.L.R.B.*, 217 F.2d 575, 576 (2d Cir. 1954), with *N.L.R.B.* v. *General Stencils, Inc.*, 472 F.2d 170 (2d Cir. 1972), and *N.L.R.B.* v. *Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir.), by posting a notice to that effect or otherwise, *Intertherm, Inc.*, 235 NLRB 694 (1978); *Passavant Memorial Hospital*, 237 NLRB 138 (1978).

His later threat (March 1980) to job applicant Axtell, *infra*, leaves little doubt that his isolated attempt at retraction and repudiation was mere lip service, masking continued hostility and unlawful acts to thwart employees support for the Union. *Austin Power Co.*, 141 NLRB 183, 192 (1963).

D. *The Events of March 1980*

At the hearing, the General Counsel amended the complaint to allege that in or about March 1980, at the Main Street plant, Schlossberg, in further violation of Section 8(a)(1), threatened an employee with discharge based on her union activities and sympathies and the activities and sympathies of fellow employees. In support of this new allegation, the General Counsel adduced testimony of Debra Axtell. Axtell, a current employee of Respondent, credibly testified that while being interviewed for employment on March 20, 1980, Schlossberg told her that there were no regular jobs available and that he would have to hire her on a *temporary* basis. He told her that the Union was trying to get into the shop and that if he heard "anything of [you] being involved in the Union, the 'temporary' could be 'very temporary.'" In response to Schlossberg's statement, employee Axtell said, "I understood the conversation." She was hired and told to start work on Monday, March 24, which she did. On cross-examination, Axtell testified that she has never signed a union authorization card. I conclude that Schlossberg's statement to her that her job could be "very temporary" if he heard anything of her becoming involved with the Union, as alleged, was a threat of discharge in violation of Section 8(a)(1) of the Act. With regard to Axtell's testimony, Schlossberg testified that he did not believe that he talked about her job becoming "very temporary" if she were involved with the Union, but said that if he did so, it was done in a "jesting manner." I do not credit any such equivocal denial or the legal effect of any such jest.

E. *The Alleged Violation of Section 8(a)(5) and (1) of the Act*

The Unit

The complaint alleges the following constitutes an appropriate Respondent employee unit for bargaining within the meaning of Act:

> All production amd maintenance employees, plant clerical employees, shipping and receiving employees employed by the Employer at its facilities located at 18 North Main Street and at Edison Street in Hornell, New York; excluding truckdrivers, cutters and spreaders, office clerical employees, professional employees, guards and supervisors within the meaning of the Act.

In substance, Respondent denies that such a unit is appropriate in Respondent's plants because, according to Respondent there is no classification such as cutters and spreaders to be excluded from the regular production and maintenance unit because of a community of interest among such employees; and, in any case, Respondent denies that there is any classification whatsoever of truckdrivers among its employees.

In substance, Respondent argues that its cutters, spreaders, and truckdrivers are all production and maintenance employees with a community of interest among all such employees and that their exclusion would make the pleaded unit inappropriate under the circumstances of Respondent's practice and organization.

In addition, Respondent, contrary to the General Counsel, would include Doni Binder as an employee for purposes of counting a majority whereas the General Counsel would exclude her as a supervisor or, in any case, an agent of Respondent with interests incompatible to the remainder of production and maintenance unit; and the General Counsel would exclude as a supervisor, William Spicer, brother of, and sometimes admittedly a cutter supervisor in the place of, Leon Spicer, the admitted cutter-spreader supervisor.

F. *Jimmy Forrester; the Truckdrivers*

In his brief, the General Counsel concedes that Forrester regularly performs inside work (br., p. 7) and does not oppose his inclusion in the unit. Whereas Respondent asserts there is no definable group of truckdrivers, the General Counsel insists that, as a group, truckdrivers be excluded. There is a failure of proof demonstrating the existence of such a group. I shall therefore recommend the elimination of "truckdrivers" from the pleaded unit exclusions.

G. *The Exclusion of Doni Binder*

Immediately next to the cutting room at the Edison Street plant, on the second floor, there is a sewing room wherein approximately 10 to 20 sewing machine operators do basic sewing on newly cut materials trucked in from the cutting room. The machine operators in the sewing room are paid on a piece rate. Among the personnel in the sewing room is Doni Binder who, in July 1979, was paid at an hourly rate. Certain nonsewing machine personnel (packers and bundlers) in the cutting room and in the sewing room were also paid on an hourly rate. Doni Binder receives the trucked, cut goods from the cutting room and then separates and distributes the bundles to the sewing machine operators, thereafter collecting the sewn pieces from the same operators. She is the sole person in telephone contact both with the cutting room and with Henry Schlossberg over in the Main Street factory. She performs sewing operations about 1 hour a day and meets with Leon Spicer, the cutting room supervisor (who is in charge of the entire Edison Street building and its personnel) once or twice per day. Aside from the 1-hour daily sewing that she performs, she performs 3 to 4 hours per day of distributing and collecting work and also is the sole employee who trains new employees on the sewing machines. It takes her about 1 day to train a sewing machine operator. She testified that for purposes of giving employees time off, she is the recipient of the request from the sewing machine employees but goes to Schlossberg for permission to give the employees time off. She does not figure the operators' timesheets and she denies that Schlossberg consults with her on timesheets. She also denied that she speaks to Schlossberg concerning employees who fail to make "rate." However, she admitted that she alone checks on the quality of each sewing machine operators' work but does not ask any operator to redo faulty work. She is paid a Christmas bonus but the record is barren as to the basis of the bonus and whether employees other than supervisors get the bonus. She does not report lateness of employees and, when operators tell her of the breakdown of machinery, she merely reports the condition to the mechanics. Upon machine breakdown, she transfers the operator to another machine if the repair takes a long time. She testified that, while the employees go to the bathroom without her permission, she admits that, without consultation, she reports to Henry Schlossberg if an employee takes too much time in the bathroom. In addition, she reports to Schlossberg, at Schlossberg's direction, anything that goes wrong in the sewing room.

Chief Supervisor Leon Spicer, supervisor of the cutting room and overall supervisor of all operations in the Edison Street building, including the sewing room where Binder works, testified that he speaks to Doni Binder 10 or 12 times per day both on the phone and in person. His description of the flow of work is that he receives the assignments of work, often by phone, in the cutting room from Schlossberg who tells him what needs to be sewn after his cutting operation. Then Leon Spicer directs the cuts (or takes cut materials from inventory) into the sewing room where he gives the cut material to Binder. He then tells her what needs to be sewn. Doni Binder then distributes the cut work to the sewing machine operators and takes the finished work to trucks outside the sewing room where the sewn goods are trucked over for finishing sewing to the Main Street plant (where the items are then packed and boxed). Although he testified that in cases of absenteeism or sickness, he transfers employees to and from the sewing room and the cutting room, he admitted that Binder selects employees to work in the cutting room when Spicer says that he needs extra help and asks her to send someone in. Binder then selects employees who are not busy to go into the cutting room for work. He testified that, in addition, Binder decides how many operators are required to do in addition, Binder decides how many operators are required to do an operation on the sewing machines. He does not decide any such questions. Lastly, Leon Spicer testified that, if a sewing machine operator is not "working out," it would be Doni Binder who would report this matter to Schlossberg. Spicer testified that he visits the sewing room only twice a day and each time for about 5 minutes. Schlossberg visits the Edison Street plant for a few minutes each day.

Mildred Carnes, an employee presently employed for about 13 years, occasionally works in the main office at Main Street plant. She testified that on occasion she

overheard conversations between Schlossberg and Doni Binder. These conversations occurred over a period of 3 years and at least one of them was heard in the last 6 months. She heard Schlossberg ask Doni Binder, on the telephone, how well she knows a particular sewing machine operator and whether the sewing machine operator would be a good worker. As late as December 1979, he heard her ask whether a former employee (Donna Campbell) should be hired back. This testimony of Mildred Carnes was never denied nor was it tested on cross-examination.

Lastly, Leon Spicer testified that with regard to discipline in the sewing room at the Edison Street plant, it is Binder who initiates discipline for employees remaining in the bathroom too long or talking too much at work. With regard to reprimanding and disciplining of such employees, he testified that Binder first talks to Schlossberg about the matter and that Schlossberg then comes over to the Edison Street sewing room and speaks to the offending employees in Binder's presence.

On the basis of the above-credited evidence, it appears that Binder does little production work of the machine operators; is the sole person who initiates discipline in the sewing room; reports in disciplinary problems to higher authority; is present when discipline is meted out by Schlossberg; is solely responsible for inspection of the quality of the work; alone trains new employees; assigns employees to machines in her own discretion with regard to how many operators are necessary to perform a single operation; assigns employees who are not too busy, in her own discretion, to work in other work areas at the request of Leon Spicer; and, but for the 10-minute-per-day presence of Leon Spicer in the sewing room (Schlossberg passes through the sewing room on a daily basis), would be the only person who would regularly and directly supervise the activities of 10 to 20 sewing machine operators in the period April through July 1979. On the basis of her regular activities described above, I conclude that she is a supervisor within the meaning of Section 2(11) of the Act and should thus be excluded from the pleaded unit.

H. *The Exclusion of William Spicer*

The General Counsel contends that William Spicer, brother of Leon Spicer, employed by Respondent as an employee in the cutting room for more than 20 years, should be excluded both as a supervisor and under the category of being a "cutter." I agree on both grounds, but, since William Spicer's position with regard to supervisory status is borderline and his exclusion as a cutter a matter not entirely free from doubt, I will pass on both matters. With regard to William Spicer's supervisory status in the cutting room, the facts show that he has been employed overall for 23 years and more than 20 years in the cutting room. There are about a dozen employees in the cutting room including four to five employees who run the cutting machines, including Chief Supervisor Leon Spicer, and four spreaders, with the balance being employees who sort colors, tie bundles, do shipping and receiving work, and any other work necessary for the proper operation of the cutting room. All cutting room employees dust and make markers. William Spicer testified that he spends all his time in the cutting room doing about 80-percent cutting and 20-percent dusting markers and making markers.

In the absence of brother Leon Spicer during vacations (2 weeks each year), sickness (sporadic) and momentary absences (seldom), William Spicer takes over Leon Spicer's duties as a supervisor. Like Leon Spicer, he oversees the activities in the cutting room but does not engage in any activity in or over the employees in the adjacent sewing room.[11] Thus, he calls the "cuts" in materials over to the Main Street office; assigns work to the employees in the cutting room; and shifts work among the employees in the cutting room but never threatens or engages in discipline among the employees. When discipline is required in the absence of Leon Spicer, he recommends the discipline to Henry Schlossberg who ordinarily follows his recommendations and does not wait for Leon Spicer to return to administer discipline. William Spicer's role as a substitute supervisor for his brother Leon Spicer has occurred regularly for the last 12 years. No other employee performs this function. He received a Christmas bonus, but, as in the case of Binder, the record is unclear as to whether only supervisors receive bonuses or whether bonuses are given to employees.

The General Counsel contends that William Spicer, a substitute supervisor, should be excluded from the production and maintenance bargaining unit principally because his otherwise sporadic and irregular assumption of admittedly supervisory functions, by recurring over a span of years, has achieved "regularity" which destroys the community of interest with coemployees. I agree but on different grounds. While the rule appears to be that part-time supervisors who regularly assume that position are not excluded, the rationale therefor consistently flows from the fact that the erstwhile "employees" exercise their part-time supervisory functions over employees who are ordinarily foreign to the work which the sometime supervisor engages in as an employee. Here, however, when William Spicer, the supervisor's brother, returns to his employee status, he is among the very employees whom he controlled as supervisor, thereby creating that "divided loyalty" which destroys the ordinary community of interest he would otherwise share with them. See *Westinghouse Electric Corporation*, 163 NLRB 723, 727 (1967); *Great Western Sugar Co.*, 137 NLRB 551 (1962), and *Statler Industries, Inc.*, 244 NLRB 144 (1979).[12] If not excluded as a "cutter," he should be excluded as a supervisor.

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[11] Thus, at these times, Doni Binder has no higher supervision in the Edison Street plant. There is also little question that her consistently evasive testimony was designed to obscure her role in the sewing room.

[12] The crucial finding here, as in *Westinghouse Electric, supra* at 727, is that William Spicer's recurring supervisory function is "closely intermingled with [his] nonsupervisory work activity." In addition, here, unlike *Westinghouse Electric*, William Spicer is called upon to fill in as supervisor on a sporadic basis and not "for a measurable and continuous period of time."

I. *The Configuration of the Appropriate Bargaining Unit*

As above noted, the General Counsel and the Union allege that the appropriate bargaining unit should be confined to production and maintenance employees excluding, *inter alia*, the truckdrivers (I have already recommended the elimination of the truckdriver exclusion which does not materially effect the results herein), cutters, and spreaders, office clerical employees, professional employees, guards and supervisors within the meaning of the Act. Respondent does not contest the exclusion of office clericals and supervisors along with the professionals, and guards, but does assert that cutters and spreaders should be included both because of the lack of such rigid classifications in Respondent's plant and because of the community of interest among all production and maintenance employees including those categories.

With regard to *cutters* and *spreaders*, the evidence shows as follows:

Cutters: Cutting Room Supervisor Leon Spicer testified that there are 12 cutting room employees including 4 cutters and 4 spreaders. The four cutters: William Spicer, Terry Warden, Fred Lehman, and Tim Nizbet. He said that Nizbet spends only about 10 percent of his time as a cutter and 90 percent of his time operating the automatic spreading machine; William Spicer spends about 85 to 90 percent of his time as a cutter; Terry Warden, 95 percent of his time; and Fred Lehman 50 percent of his time as cutters. Lehman's remaining duties include spreading, unloading and loading trucks, sorting bundles, dusting markers, truckdriving, and sweeping the floor. With regard to Nizbet, 75 percent of his time is actually spent on the automatic spreading machine, 10 percent in cutting, and 15 percent of his time doing the same extraneous work with dusting markers, sorting bundles, and unloading trucks as does Fred Lehman.

William Spicer testified that the cutters operate high-speed cutting machines cutting up to 600 layers of cloth in a single operation. Thus the cutting operation demands substantial skill and care with regard to mistakes, for a single mistake may result in financial problems of a high order. The evidence shows that it takes more than a year to fully train a cutter though the fundamentals can be quickly taught. Lastly, William Spicer testified that all the cutters do spreading from time to time and also do some tying of bundles, the dusting of markers, and making of markers. William Spicer testified that it takes "years" to train a cutter and that only he and his brother, Leon Spicer, train the new cutters the source of which is from plant workers found to be conscientious. Leon Spider, alone, supervises the cutting room operations and its employees, except when William Spicer acts in his place.

The Spreaders: William Spicer testified that four employees (Constantino, Rice, Whitford, and Sanford) are the four cutters. They ordinarily work in teams of two. It takes two spreaders to operate the manual spreading machine which spreads cloth on the cutting tables. He testified that they spend 80 percent of their time in spreading operations and 20 percent of their time in bundling cut garments, assorting, preparing the markers, and dusting the markers. Unlike Leon Spicer's testimony, he did not assert that all cutting room employees regularly unload trucks. He testified that while some of the cutting room employees do unload trucks, ordinarily it is not the cutters or spreaders, but the nonspreaders and perhaps one time a week, the cutters and spreaders. He noted that Lehman, a cutter, sweeps the floor on a daily basis.

William Spicer estimated that the spreaders spend 80 percent of their time in spreading and Leon Spicer said that they spend 90 percent of their time spreading and 10 percent bundling and tying the cut goods. Although spreaders need no special pretraining, and all are trained in the cutting room, Leon Spicer testified that it takes 1 to 2 months to train a spreader although an inexperienced cutting room employee could be put on a spreading machine after about a week's training as a preliminary matter. Leon Spicer also testified that, on occasion, the cutters and spreaders would drive trucks and unload them when necessary.

On the basis of the above, it appears clear that the cutters and spreaders perform functions which are highly integrated one to the other with common operations of dusting and making of markers, and, from time to time, the bundling and tying of goods along with other employees. These latter operations consume 10 to 20 percent of the time of the spreaders and cutters with truckdriving not more than 2 or 3 percent. These cutting room employees are separately supervised (by Leon Spicer notwithstanding his perfunctory supervision over the sewing room and shipping and receiving employees) and are remote from all other supervision because the Main Street plant is about a mile away. Thus, in addition to separate supervision, the cutters and spreaders are remote geographically from other production and maintenance employees except the sewing room employees who are separated from them in a different room on the same floor of the Edison Street plant. The evidence shows that only a minor and sporadic amount of their time (the cutters and spreaders) is spent in such functions as truckdriving, unloading, or even unbundling and tying up cut bundles. The nonspreader, noncutter employees in the cutting room regularly perform functions other than cutting room functions (truckdriving, shipping, and receiving). I conclude, contrary to Respondent's assertions, that the cutters and spreaders are a homogeneous group of highly skilled employees, separately trained, separately supervised, physically isolated, with craft interests and functions different from other production and maintenance employees. *Benjamin and Johnes, Inc.*, 133 NLRB 768 (1961). The eight cutters and spreaders should be excluded on a craft basis in view of the lack of departmental integration of other cutting room employees who often perform tying, bundling, shipping, receiving, and driving. Cf. *Newburgh Mfg Co., Inc.*, 151 NLRB 763, 765 (1965); *Arnelle of California*, 217 NLRB 986 (1975). In *Benjamin and Johnes, Inc.*, the Board held that cutters and spreaders were craft employees and, if they performed (as in the instant case) the "highly skilled function of . . . marking;" they could be represented separately as a craft unit (133 NLRB 786, 769), notwithstanding that a departmental unit, under other factors, might

also be appropriate. See *The Berger Brothers Company*, 116 NLRB 439 (1956).

J. *The Union's Majority Status*

During the hearing, all parties entered into a series of stipulations relating to the size of the unit (comprising the employees in both plants) and to certain union authorization cards. In particular, the parties stipulated that, excluding seven admitted office clericals and supervisors, and a summer student (McShane), Respondent employed a maximum of 209 employees on July 9, 1979, at 6:45 a.m., when the union, as Respondent admitted, made a demand in the pleaded unit. Respondent asserts (br., Appendix B) that of a 109 total cards in evidence, 7 were signed by employees after the demand (but on or before July 13) and 2 were signed by employees (Van Skiner and Hadsell) not on the stipulated list. This would leave 100 cards. On the other hand, I have excluded Binder and William Spicer as supervisors (thus reducing the unit to 207) and 8 cutters and spreaders (thus further reducing the unit to 200). However, as Respondent observes, the exclusion of the eight cutters and spreaders requires the concomitant exclusion of four cards:[13] Dan Smith, Richard Rice, Royce Whitford, and Terry Warden. Although the Union asserts (br., p. 31) that only two timecards should be excluded if cutters and spreaders be excluded, it fails to name the two. Moreover, the evidence shows that Dan Smith, Royce Whitford, and Richard Rice are, without contradiction, identified as regular spreaders and Joint Exhibit 1 shows them on the payroll as late as July 6, 1979. The fourth card signer to be excluded is Terry Warden, a regular cutter. This would result in 96 cards and 200 employeees.

I therefore conclude that, on the morning of July 9, when the demand for recognition was made, the Union did not have a majority in the unit.

Respondent concedes (br., Appendix B) that, after this union demand was made, still on July 9, three (3) more cards were signed (Nolton, Sandford, and Yorka); that fourth and fifth cards (Oakden and Cipolla) were signed on July 10; that a sixth card (Magill) was signed on July 11; and a seventh card (Hurlburt) on July 13.

Whereas Respondent asserts that on July 10 there were 205 unit employees (br., Appendix C), I have excluded the 8 cutters and spreaders. Thus, with 198 in the unit and excluding Kathleen Doll's card and Kathleen Doll (quit on July 9) leaving only 197 but adding the 5 cards, above, executed on July 9[14] and 10, there would appear to be a net gain of 4 cards. Thus, 100 cards and 197 in the unit. If, as I have concluded Doni Binder is also excluded, there would be 100 cards and only 196 unit employees. Magill signed a card on July 11. Thus, 101 cards and no more than 197 in the unit on July 11.

Hurlburt, hired on July 11, signed a card on July 13. As of July 13, therefore, here, in the absence of other hirings and losses in the unit, there would be 102 cards and no more than 198 employees.

I conclude, nevertheless, that on July 10, 1979, the union first achieved majority status in an appropriate unit for bargaining within the meaning of Section 9(a) and (b) of the Act: 100 valid cards and 197 unit employees.

K. *Other Contentions of the Parties*[15]

(1) Respondent would subtract from the number of authentic cards, a group of seven cards (Mattison, Carpenter, Dawson, Stanford, Young, Becher, and Estey) since these employees sought to revoke their cards before the union's July 9 demand for recognition (br., Appendix B). The evidence shows, and Respondent concedes (br., pp. 29–33) that these seven employees signed union cards in March and April 1979. The earliest attempted revocations were Mattison and Carpenter, on June 7. Dawson also said she sought revocation in June, but wrote to the Union on July 2. Although they may have earlier (in June) attempted revocation, Stanford, Young, Becher, and Estey signed a petition to the National Labor Relations Board on July 9 seeking return of their cards.

The evidence thus shows that these revocations all occurred after Schlossberg's speeches of April 27 and 30 and May 8. These speeches contain many unlawful threats of reprisal (layoff, close down, subcontracting out unit work in case of a strike, loss of benefits, diminution of vacation pay, more strigent hiring policies) and were designed to create an atmosphere of intimidation against continued support for the Union. Under such circumstances, I infer that these employees were induced into protecting themselves by revoking their cards. As the Union observes (br., pp. 21, *et seq.*), Schlossberg led employees to believe that employees returning to work would be charged a fee if the Union were successful; and, regardless of revocation, there is undenied evidence that revoking employees were afraid to disclose that they had actually signed union cards in the first place; and that, prior to even the earliest revocations, in one of Schlossberg's unlawful speeches, he suggested that employees write to the Union to have their cards returned.

Under such circumstances, since the Board presumes that the revocation is "ineffective," *Warehouse Groceries Management, Inc.*, 254 NLRB 252 (1981), I will recommend that the Board ignore the seven purported revocations and count the cards. See also *World Wide Press, Inc.*, 242 NLRB 346 (1979); *Serv-U-Stores, Inc.*, 225 NLRB 37, 39 (1976); *Marcus J. Memorial Lawrence Hospital*, 249 NLRB 408 (1980); cf. *Laclede Cab Co. d/b/a Dollar Rent a Car*, 236 NLRB 206, 211 (1978), and *Production Plating Co.*, 233 NLRB 116 (1977).

(2) The General Counsel and the Union assert that the Union's admitted July 9 request for recognition was a "continuing" request. In support of that assertion, the

[13] As noted in the text hereafter, by July 13, if all eight cutters and spreaders are *included*, there would be a union card majority even if Binder were inclueded.

[14] On the afternoon of July 9, with a net increase of 2 cards, there would be 98 cards and 196 employees. It should be noted that the exclusion of William Spicer is counted only once.

[15] At the hearing, Respondent, through employee Lea Dawson, sought to elicit testimony that several cards, including hers, and were executed on the card solicitor's assertions that there would be an election. No such argument appears in its brief. I would reject any such testimony, upon demeanor grounds alone, elicited from Lea Dawson. The transcript underscores such a conclusion. Respondent, however, appears to have abandoned the position. See *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492 (1979).

General Counsel submitted with and attached to its post-trial brief (as G.C. Exh. 12) a copy of the purported demand letter. No such letter was offered in evidence nor was there a sufficient preliminary foundation laid which would identify it as the actual demand letter which Schlossberg admittedly read before rejecting the Union's request; nor does Schlossberg's testimony sufficiently identify or authenticate the document. I shall therefore grant Respondent's post-trial motion (Exh. 5) and deny the General Counsel's application to have the document received in evidence. Contrary to Respondent's further request, I shall neither direct return of the document to the General Counsel nor expunge the matter from the briefs of the General Counsel or the Union. My decision in this latter regard flows from the fact that it is at least arguable that my discussion with the General Counsel constituted an anticipatory rejection of the letter and may have denied the General Counsel and the Union the opportunity to a full and fair hearing with the right to argue that the document demonstrates a "continuing demand,"[16] notwithstanding that neither the General Counsel nor the Union sought to offer the document (in the absence of any formal ruling) and place the matter before the Board by preserving their rights in the "rejected exhibit file" or otherwise.

In view, therefore, of my conclusion that, as of the hour of the demand on July 9, 1979, the Union failed to prove that it represented a majority of Respondent's employees in "an appropriate unit," and since there is no basis in the record to show that Union's demand might be characterized as a "continuing demand," I shall recommend to the Board that it dismiss the General Counsel's allegation that Respondent's July 9 rejection of the Union's demand violated Section 8(a)(5) of the Act. *Warehouse Groceries Management, Inc., supra.*

In any event, the above matter, except for the technical question of whether Respondent's refusal to bargain violated Section 8(a)(5), is substantially rendered academic in view of my finding, above, that by July 10, 1979, and on July 13, 1979, the Union did achieve majority status in "an appropriate unit" and that Respondent's unfair labor practices should be remedied, as hereafter specified, *inter alia,* with a bargaining order. *Grandee Beer Distributors, Inc.*, 247 NLRB 1280 (1980).

IV. THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Contrary to Respondent's suggestion that an election would be the appropriate remedy, *Linden Lumber Division*, 419 U.S. 301 (1974), I shall recommend that the Board require Respondent to bargain with the Union, commencing with the date it first achieved majority status, July 10, 1979. *Trading Port, Inc.*, 219 NLRB 298 (1975); *Bighorn Beverage*, 236 NLRB 736, fn. 1 (1977); *Pilgrim Life Insurance Company*, 249 NLRB 1228 (1980). This conclusion, it seems to me, renders moot the issue, *supra*, of the Union's alleged "continuing demand" to bargain. Except for the technical issue of whether Respondent's refusal to bargain of July 9 creates an 8(a)(5) violation because of a "continuing demand," no bargaining order could attach until the Union achieved majority status, which was July 10. Hence, since Respondent's unfair labor practices are sufficiently pernicious to render an election a doubtful vehicle, I conclude that a bargaining obligation attaches on July 10 regardless whether the Union's July 9 request to bargain was "continuing" or, indeed was ever made at all. See *Bighorn Beverage, supra at fn. 1; Grandee Beer Disrributors, Inc., supra* at fn. 5.

The conclusion that a bargaining order is required here, rather than the direction of an election,[17] is derived from *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

Violations of Section 8(a)(1)

The independent violations of Section 8(a)(1) of the Act derive principally from Schlossberg's speeches. The speeches, without objective evidence or economic conditions beyond Schlossberg's control, *Warehouse Groceries Management, Inc., supra*, citing *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Jamaica Towing, Inc.*, 247 NLRB 353 (1980), enforcement denied 632 F.2d 208 (2d Cir.), predict layoffs due to the Union's rigid classification of employees, onerous limitations on the amount of leave and the taking of vacations, layoffs of pregnant women and the physically handicapped who would be unable to make a union-imposed high rate of minimum production; subcontracting out of work in the event of a strike without significant detriment to Respondent; and threats to discharge the five employee union ringleaders,[18] threats to time employees in the bathroom, to impose a strict ban on smoking, and to prevent employees from eating inside the factory if they demand a sanitary lunchroom; and to not hire 16- and 17-year employees.

The Board, in *Gissel* cases, as here, has consistently made plain the seriousness of threats of loss of employment whether by plant closure, discharge, or layoff, construing it as one of the most "flagrant means by which an employer can hope to dissuade employees from supporting a union. *Propellex Corporation, a subsidiary of Essex Cryogenics Industries, Inc.*, 254 NLRB 839 (1981), citing *Pittsburg and New England Trucking Co.*, 249 NLRB 833 (1980). The "spectre of job loss . . . once conjured up is not easily interred." *El Rancho Market, supra*, 235 NLRB at 476.

[16] The document, on its face, recites that it is a "continuing demand."

[17] I take official notice of the Union's filing of a petition for certification in the unit pleaded in the complaint on November 28, 1979, in Case 3-RC-7655.

[18] From G.C. Exh. 8, Schlossberg's April 30 speech to all employees:

> . . . somebody came to me and said did you know the 5 girls who are involved in this just take all five and fire them. . . . I also want to caution the five people that are in the room right now. I have enough information to put them in a position where they have been in absolute violation of all federal standards—if I choose to exercise it right now. They have problems. . . I could stand them up and make things very hot and heavy. I choose not to—I don't feel that that is the proper thing. I wouldn't want to be in their seat.

While the Board and courts may differ on the issue (not present in this case) of *dissemination* of such threats and its effect on whether a fair election can be held after the termination of the posting period prescribed in a cease-and-desist order, compare *General Stencils, Inc.*, 195 NLRB 1109 (1972), enforcement denied 742 F.2d (1972), cited in *N.L.R.B.* v. *Jamaica Towing, Inc., supra* at 213, there is agreement that such threats are "hallmark" threats to be treated with deference under the Supreme Court's *Gissel* mandate: "Their presence will support issuance of a bargaining order unless some significant mitigating circumstance exists," *N.L.R.B.* v. *Jamaica Towing, Inc., supra* at 214; *Grandee Beer Distributors, Inc., supra.*

In addition, as here, the Board, in *Ed Chandler Ford, Inc.*, 254 NLRB 851 (1981), as it has consistently at least since *General Stencils, Inc.*, 195 NLRB 1109, 1110 (1972),[19] has been particularly impressed by such "hallmark" threats eminating from top management. Such threats, as general manager Schlossberg—the chief supervisor—made here:

> . . . were made by . . . a man who possessed the power not only to threaten but also to turn threat into reality. Threats made by one in such a position will be seriously regarded by employees, and, thus, the *risk is increased that the threats will accompany employees to the voting booth. General Stencils, Inc.*, 195 NLRB at 1110. [Emphasis supplied.]

In *Ed Chandler Ford, Inc., supra*, where a bargaining order was in issue, the Board held, that, as here, a unitwide speech, with threats of discharge and loss of existing benefits, by an important supervisor, was so serious that:

> . . . the effects of which are unlikely to be eradicated by our usual cease-and-desist remedial order but which will remain to interfere with the employees' expressing a free choice [in an election] . . . . Consequently . . . we shall order Respondent to recognize and bargain with the Union upon request . . . .

Lastly, Schlossberg's continued, unlawful hostility to the Union was manifested 8 months later in his discharge threat to Axtell in March 1980.

Violations of Section 8(a)(3)

While Schlossberg's July 12 violations of Section 8(a)(3) following the Union's demand for recognition on July 9 were not widespread (discharge of Hurlburt; placing Pawlica "on notice") they were neither legally retracted nor isolated. Cf. *N.L.R.B.* v. *Jamaica Towing, Inc., supra* at 214. Dissemination of these discriminatory acts may be presumed; the effects on the employees, after assurance on July 9 in his speech that in spite of the Union's demand, there would be no discharges, need no elaboration.

In short, in terms of the effect of the unfair labor practices on future election conditions and the likelihood of practices on future election conditions and the likelihood of their recurrence in the future, this case falls into the "less-than-egregious" *Gissel* category but is one where the use of traditional remedies to ensure a fair election would be ineffectual. Union membership cards serving as a determinant of employee sentiment, on balance, should serve as a basis for a bargaining order since Schlossberg's unremitting hostility and threats of discharge cannot here escape employees concern as they enter the voting booth.

With regard to the issues of employee "turnover"[20] and "passage of time" raised by Respondent at the hearing and in the brief (br., p. 62) to defeat issuance of a bargaining order, I note that the Board rejected those factors in *Jamaica Towing, Inc.*, 247 NLRB 353 (1980), and, with all due respect to the Court of Appeals, I am bound by the Board's determination, *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), notwithstanding the court's contrary dictum. It is important to note, however, that some of the court's criteria in *N.L.R.B.* v. *Jamaica Towing, Inc.*, 632 F.2d 208, for utilizing such factors in refusing bargaining orders do not exist here: there has been no proof of a change of management, and no "genuine and sincere assurances to the work force of non-interference . . . ." Rather, 8 months after rejecting the Union's bargaining request, Schlossberg threatened an employee (Axtell) with discharge if he discovered that she engaged in union activities. Moreover, here, as opposed to *Jamaica Towing, Inc.*, there are "hallmark violations" of Section 8(a)(1) and violations of Section 8(a)(3) following the Union's request for recognition.

In any event, those issues (turnover and passage of time) will be resolved by the Board if and when the Board enforces this recommended Order and Respondent fails to comply therewith.

The three factors ultimately demonstrating the lingering effects of Schlossberg's unfair labor practices and militating in favor of use of the bargaining order remedy are: (1) the attempted withdrawal of no less than seven membership cards in June and July 1979; (2) Schlossberg's reflexive unlawful discharge after the July 9 bargaining demand despite contempraneous assurances to the contrary; and (3) the March 1980 threat of discharge to Axtell.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the conduct described in section III, above, including unlawful acts of giving the impression of surveillance of union activities, threats of retaliation

[19] The court of appeals in *N.L.R.B.* v. *General Stencils, Inc.*, 472 F.2d 170 (2d Cir. 1972), denied enforcement for the second time. In its first denial 438 F.2d 894 (2d Cir. 1971), the court appeared to find mitigation in the coercive quality of the threats of the employer's general manager, the corporate secretary because, at times, he wore overalls and helped in production work. No such proof exists here.

[20] Approximately 70 new unit employees were hired in the year following the Union's July 9, 1979, request for recognition. Cf. *N.L.R.B.* v. *Dadco Fashions, Inc.*, 632 F.2d 493 (5th Cir. 1980).

including layoff, discharge and subcontracting, loss of existing benefits, and unlawful coercive interrogation, Respondent is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging and placing employees "on notice," because employees engaged in Union activities, Respondent unlawfully discriminated against such employees in violation of Section 8(a)(3) and (1) of the Act.

5. All production and maintenance employees, plant clerical employees, shipping and receiving employees employed by Respondent at its facilities located at 18 North Main Street and at Edison Street in Hornell, New York, excluding cutters and spreaders, office clerical employees, professional employees, guards and supervisors constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act.

6. The unfair labor practices of Respondent have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.[21]

Upon the foregoing findings of facts, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[22]

The Respondent, Marion Rohr Corporation, Hornell, New York, officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, placing on notice, or otherwise discriminating against its employees because they engage in union activity or because they engage in concerted activity for their mutual aid or protection.

(b) Creating an impression of surveillance of its employees' union activities and coercively interrogating them.

(c) Threatening its employees with any reprisals if they select the Union as their collective-bargaining representative.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, recognize and, retroactively to July 10, 1979, bargain collectively in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 280, International Ladies' Garment Workers Union, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate bargaining unit:

> All production and maintenance employees, plant clerical employees, shipping and receiving employees employed by Respondent at its facilities located at 18 N. Main Street and at Edison Street in Hornell, New York, excluding cutters and spreaders, office clerical employees, professional employees, guards and supervisors within the meaning of the Act.

and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Expunge from any of its records any notation regarding the July 12, 1979, discharge of Lucinda Hurlburt and the July 12, 1979, discipline of Carole Pawlica.

(c) Post at its plants in Hornell, New York, copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representatives, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein; and the petition in Case 3-RC-7650 be dismissed.

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[21] In view of the fact that the unlawful discharge of Hurlburt did not result in the loss of pay or any other detriment and since she was reinstated to her old position, I have not included a make-whole remedy for backpay and interest with regard to Hurlburt.

[22] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."